

BRIAN M. BOYNTON
Acting Assistant Attorney General
MARCIA BERMAN
Assistant Director, Federal Programs Branch
KATHRYN L. WYER (Utah Bar No. 9846)
U.S. Department of Justice, Civil Division
1100 L Street, N.W., Room 12014
Tel. (202) 616-8475
kathryn.wyer@usdoj.gov
Attorneys for Defendants

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

ISAI BALTEZAR & JULIE CHO,

Plaintiffs,
v.

MIGUEL CARDONA, in his official
capacity as Secretary of Education, *et al.*,

Defendants.

Case No. 5:20-cv-455-EJD

**RESPONSE TO PLAINTIFFS'
REQUEST FOR JUDICIAL NOTICE**

Date: March 24, 2022

Time: 9:00 a.m.

Place: Courtroom 4, 5th Floor

Judge: Hon. Edward J. Davila

On February 14, 2022, Plaintiffs filed a Request for Judicial Notice [ECF No. 62], requesting that the Court take judicial notice of two documents issued by defendant the U.S. Department of Education (“Department”) during its negotiated rulemaking proceedings, which remain ongoing. Defendants agree that the Court may take judicial notice of the Department’s issued documents. However, Plaintiffs have misstated the significance of these documents to this case.

The Department’s issuance of issue papers describing its interest in, and soliciting information regarding, new criteria to define how an applicable program can demonstrate it prepares students for “gainful employment in a recognized occupation,” demonstrates that the

1 Department is proceeding to address gainful employment issues at the administrative level and
 2 thus supports Defendants' Motion for Voluntary Remand [ECF No. 48]. However, the issue
 3 papers do not support vacatur of the 2019 Rule that rescinded the previous 2014 GE Rule.
 4 Although the issue papers represent the Department's current policy position with respect to GE,
 5 they do not—contrary to Plaintiffs' suggestion—amount to a concession that the 2019 Rule was
 6 in violation of governing statutory requirements.
 7

8 In fact, the issue papers support remand without vacatur because they indicate that the
 9 Department does not plan to simply reinstate the prior 2014 GE Rule but is instead considering
 10 the issue anew. To require the Department to attempt to resurrect the 2014 GE Rule at the same
 11 time it is engaged in rulemaking processes to promulgate a new rule would be disruptive both to
 12 the Department and to those impacted by the Department's regulations, as the Department has
 13 previously explained. *See* Declaration of James Richard Kvaal [ECF No. 48-1] ¶¶ 8-10; Def.
 14 Reply [ECF No. 56] at 2-15.
 15

16
 17 DATED: February 18, 2022

Respectfully submitted,

18 BRIAN M. BOYNTON
 19 Acting Assistant Attorney General

20 MARCIA BERMAN
 21 Assistant Director, Federal Programs Branch

22 /s/ Kathryn L. Wyer
 23 KATHRYN L. WYER (Utah Bar No. 9846)
 24 U.S. Department of Justice, Civil Division
 25 1100 L Street, N.W., Room 12014
 26 Tel. (202) 616-8475
 27 kathryn.wyer@usdoj.gov
 28 *Attorneys for Defendants*